Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 14-CRB-0001-WR (2016-2020) Web IV

OPPOSITION TO SOUNDEXCHANGE'S MOTION TO DENY THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION'S PETITION TO PARTICIPATE

The National Music Publishers' Association, Inc. ("NMPA") respectfully submits this Opposition to SoundExchange's Motion to Deny the NMPA's Petition to Participate in the above-captioned proceeding. The NMPA has a significant interest in the subject matter of this proceeding, and has, therefore, satisfied the standards for participation established by the Copyright Act and applicable regulations. For the reasons set forth below, SoundExchange has identified no legitimate basis to preclude the NMPA from participating and its motion should be denied.

PRELIMINARY STATEMENT

Section 803(b)(2) of the Copyright Act provides that a party may participate in a rate-setting proceeding before the Copyright Royalty Board ("CRB") so long as it has a "significant interest" in the proceeding. In its petition to participate, the NMPA clearly identified two such significant interests: (1) "any determination in this Proceeding regarding the scope of the non-interactivity versus interactivity of digital services under 17 U.S.C. § 114 directly implicates and affects the license and royalty rate paid by digital services to music publishers under 17 U.S.C. § 115," and (2) "the royalty rates determined in the above-captioned proceeding will directly impact the royalties

available to be paid by digital services to music publishers for the performance of the underlying musical work." (NMPA Pet. at 1-2.)[1] Notwithstanding these significant interests, SoundExchange asks the CRB to prohibit the NMPA from participating in this proceeding. SoundExchange's motion should be denied for the following reasons.

First, SoundExchange's motion is based on an overly narrow definition of the "significant interest" standard that is of SoundExchange's own creation. According to SoundExchange, a party has a significant interest "only if it has a direct financial interest in the actual license at issue"—that is, only if the parties are "licensors, licensees, and entities directly involved in the administration of sound recording licenses, or representatives of the same." (Mot. at 2.)[2] But SoundExchange does not—and cannot—cite any support for such a narrow construction of the "significant interest" standard. Indeed, SoundExchange appears to have adopted this self-crafted standard solely for the purpose of preventing the NMPA from participating in this proceeding. SoundExchange has not filed a similar motion with respect to any other participants in the proceeding, even though others also do not appear to satisfy SoundExchange's "direct financial interest" standard. Moreover, SoundExchange's motion in this proceeding is directly at odds with the position taken by the parties—including the record companies

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1 "NMPA Pet." refers to The National Music Publishers' Association Petition to Participate, dated February 3, 2014. The NMPA also filed a petition to participate in the proceeding that will determine rates and terms for new subscription services under Section 114. *See* NMPA Petition to Participate, Determination of Royalty Rates for New Subscription Services for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Dkt. No. 14-CRB-002-NSR (2016-2020) (New Sub III) (Feb. 3, 2014). SoundExchange has challenged the NMPA's petition in both proceedings on identical grounds. The NMPA has, therefore, filed a substantively identical opposition in that proceeding as well.

SoundExchange represents here—in prior CRB proceedings, such as the Section 115 proceedings in which those same record companies sought to (and did) participate with respect to licenses in which they had no "direct financial interest." Most importantly, SoundExchange's narrowly crafted "direct financial interest" test is inconsistent with the instructions of the Copyright Office and the CRB, both of which have specifically declined to set any bright-line test for what constitutes a "significant interest" for purposes of participating in CRB proceedings.

Second, the NMPA has a significant interest in this proceeding because it may result in a settlement or ruling from the CRB that determines or affects whether certain digital music services are considered to be interactive or non-interactive. Such a decision would directly affect whether those same services are required to pay mechanical royalties under Section 115, since services that are deemed "non-interactive"—and thus eligible for the Section 114 statutory license—are not required to pay mechanical royalties under Section 115. In contrast, "interactive" services—defined by the applicable regulations as not non-interactive under Section 114—are required to pay mechanical royalties under Section 115. Given the emergence of significant new digital music services that blur the line between interactive and non-interactive, and the importance to musical work copyright owners of ensuring that the use of their works on those services is fairly and appropriately compensated, the NMPA has a significant interest in participating in any and all discussions in this proceeding regarding the proper classification of those services.

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[2] "Mot." refers to SoundExchange's Motion to Deny the Petition to Participate of the National Music Publishers' Association, dated March 18, 2014.

Third, the NMPA also has a significant interest in this proceeding because the sound recording performance royalty rates for digital music services set by the CRB are bound to have a financial impact when the same services negotiate musical work performance royalty rates with music publishers in the future. The recent direct license negotiations between major music publishers and Pandora Media Inc. ("Pandora") (which were the subject of the just concluded rate court proceeding involving Pandora and the American Society of Composers, Authors and Publishers ("ASCAP")), plainly demonstrate that digital music services themselves view sound recording and musical work public performance royalties as one "pie" of content acquisition costs, and negotiate with music publishers accordingly. The more that streaming services like Pandora have to pay SoundExchange as a result of this proceeding, the less they will be willing to pay music publishers; the less they have to pay SoundExchange as a result of this proceeding, the more they will be able to pay music publishers. As a result, the royalty rates determined in this proceeding will directly impact the royalties available to be paid to music publishers for the performance of their musical works.

Fourth, the limitations set by Section 114(i) in no way preclude the NMPA from participating in this proceeding. Section 114(i) simply provides that license fees payable for the public performance of sound recordings shall not be taken into account in judicial proceedings to set or adjust public performance royalties payable to musical work copyright owners. It does not prevent music users from taking sound recording royalty rates into account when negotiating license agreements with music publishers or performance rights organizations ("PROs") such as ASCAP, BMI and SESAC. Indeed, Section 114(i) has no relevance whatsoever to the negotiation of rates

by SESAC or to the direct license negotiations by music publishers, neither of which are subject to judicial oversight.

Finally, the NMPA's participation will not—as SoundExchange suggests—threaten the efficiency or just administration of this proceeding. The NMPA intends to limit its participation to only those issues in which it, and its members, have a significant interest (namely, those set forth in its petition to participate), and only when those issues arise. Notably, SoundExchange has failed to identify a single example of how the NMPA's very limited involvement in this proceeding will somehow cause it (or any other participant) to expend additional time or resources. There simply is no basis for SoundExchange's professed concern that the NMPA's involvement will cause these proceedings to be any more lengthy, complex or expensive than they already would be without the NMPA's participation.

In sum, because the NMPA has established a significant interest in this proceeding, SoundExchange's motion should be denied.

ARGUMENT

I. SOUNDEXCHANGE'S MOTION IS PREDICATED ON AN UNDULY NARROW DEFINITION OF THE "SIGNIFICANT INTEREST" STANDARD

SoundExchange's motion is based on its own overly narrow definition of the "significant interest" standard. SoundExchange claims that a party has a significant interest "only if it has a direct financial interest in the actual license at issue"—that is, only if the parties are "licensors, licensees, and entities directly involved in the administration of sound recording licenses, or representatives of the same." (Mot. at 2.) But SoundExchange does not—and cannot—cite any support for such a narrow construction of the "significant interest" standard.

Neither the Copyright Act nor the CRB's procedural regulations defines what constitutes a "significant interest." The legislative history of the Copyright Act refers generally to participants having "a stake in the outcome of the proceeding," or being "directly affected by the royalty fee," but nowhere suggests that participants must have a "direct financial interest." H.R. Rep. No. 108-408, at 27 (2004), *reprinted in* 2004 U.S.C.C.A.N. 2332, 2342 (Jan. 30, 2004) ("House Report—2004 Act").

Nor has the Copyright Office provided any such instruction. To the contrary, the Copyright Office has specifically declined to set any bright-line test for what constitutes a "significant interest." When presented with the question of "what is a significant or substantial interest in a rate proceeding," the Copyright Office instructed only that "[t]he inquiry is a factual one and determinations must be made on a case-by-case basis." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services, Dkt. No. 2001-1 CARP DSTRA 2, 68 Fed. Reg. 39837-01, 39839 (Copyright Office, Jul. 3, 2003).

While the CRB subsequently noted that the Copyright Office, in its "past practice" under the Copyright Arbitration Royalty Panel system that preceded the CRB, "has required a putative participant to show some financial stake in the outcome of the proceeding in order to present a 'significant interest,'" the CRB declined to endorse—much less adopt—that standard as a formal requirement to participate in CRB proceedings. Procedural Regulations for the Copyright Royalty Board, Dkt. No. RM 2005-1, 70 Fed. Reg. 30901-01, 30902 (May 31, 2005). Instead, when it issued its procedural regulations, the CRB noted that the regulations shall "simply carry forward the statutory language, without further elaboration." *Id.* In other words, the CRB

declined to elaborate as to what circumstances would and would not satisfy the "significant interest" test.

Just as there is no support for SoundExchange's self-crafted "direct financial interest" standard, there likewise is no basis for SoundExchange's claim that "[t]o meet the 'significant interest' requirement, a proposed participant must be a sound recording copyright owner, recording artist, sound recording copyright user, a trade association, or society representing the interests of those groups, or an entity involved in the collection or administration of sound recording statutory license fees." (Mot. at 6.) SoundExchange purports to rely on the "illustrated categories of participants" (Mot. at 5) in the House Report—2004 Act. *See* House Report—2004 Act at 27 (observing that "the participant must be a party directly affected by the royalty fee (*e.g.*, as a copyright owner, a copyright user, or an entity or organization involved in the collection and distribution of royalties)"). But, once again, SoundExchange does not—and cannot—cite any support for its contention that these examples are exclusive or intended to limit in any way the parties eligible to participate in a CRB proceeding. Instead, it appears that SoundExchange simply invented this purported standard, and that it did so solely for the purpose of preventing the NMPA from participating in this proceeding. It is notable, for example, that SoundExchange has not filed a similar motion with respect to any other participants in the proceeding, even though others—such as Triton Digital—also do not appear to satisfy SoundExchange's "direct financial interest" standard.[3] And it is telling

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[3] Indeed, Triton Digital's interest in this proceeding appears to be much less significant than that of the NMPA. Triton is neither a copyright owner nor a copyright user. It merely provides back-end technologies for certain digital music services, as well as audience and advertiser measurement statistics.

that none of the other participants in this proceeding has joined in SoundExchange's motion, or otherwise suggested that the NMPA is not an appropriate participant.

SoundExchange's position is also directly at odds with the approach to participation adopted in prior CRB proceedings by the same record companies SoundExchange now represents. Those record companies, then represented by the Recording Industry Association of America, Inc. ("RIAA"), have twice participated in proceedings to set rates and terms under Section 115. In both instances, the RIAA's participation has extended to licenses for interactive streaming services in which its members have no direct financial stake. Although record companies pay mechanical royalties under Section 115 when physical phonorecords and permanent downloads are sold, they have no involvement in the payment or collection of mechanical royalties for interactive streaming services such as Spotify and Rdio, which pay royalties under Section 115 directly to music publishers. With respect to those services, the RIAA is neither the licensee nor a representative of the licensee. It is not involved in royalty collection or administration. It, therefore, would not have a "direct financial interest" under SoundExchange's current formulation of the standard. Nonetheless, the RIAA has fully participated in the determination and ultimate settlement of the rates and terms that apply to interactive streaming services. *See* Proposed Rates and Terms of the RIAA, at 2, In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, Dkt. No. 2006-3 CRB DPRA (Nov. 30, 2006) ("*Phonorecords I*") (setting forth a proposal for "On-Demand Streams Through Subscription Services); Joint Motion to Adopt Partial Settlement, *Phonorecords I* (Sept. 22, 2008) (in which the RIAA, along with the NMPA and the Digital Media Association ("DiMA") requested that the CRB

adopt a settlement negotiated by all three parties covering limited downloads and interactive streams); Motion to Adopt Settlement, Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords, Dkt. No. 2011-3 CRB (Apr. 10, 2012) ("*Phonorecords II*").

By its motion here, SoundExchange attempts to hold the NMPA to a stricter standard of "significant interest" than the record companies it represents apply to themselves. There simply is no basis for such a heightened standard. The NMPA need only show that it has a significant interest in this proceeding. For the reasons set forth below, and in its petition to participate, the NMPA easily satisfies that test.

II.
THE NMPA HAS A SIGNIFICANT INTEREST IN THIS PROCEEDING BECAUSE IT MAY IMPACT WHETHER CERTAIN SERVICES ARE CONSIDERED TO BE INTERACTIVE OR NON-INTERACTIVE

The NMPA has a significant interest in this proceeding because it has the potential to result in a settlement or ruling from the CRB that determines or affects whether certain digital music services are considered to be interactive or non-interactive. Such a result will directly affect whether those same services are required to pay mechanical royalties under Section 115, and thus will directly impact the royalties paid to music publishers.

With respect to the categorization of digital music services based on interactivity, Sections 114 and 115 of the Copyright Act are directly linked. Services that are deemed "non-interactive" are eligible for the Section 114 statutory license and are not required to pay mechanical royalties to music publishers under Section 115. Services that are deemed "interactive," on the other hand, are ineligible for the Section 114 statutory license and are required to pay mechanical royalties to music publishers under Section

115 (in addition to sound recording performance royalties paid pursuant to direct licenses). Indeed, the regulations governing Section 115 explicitly refer to the classification of music services under Section 114 for purposes of determining whether music users are required to pay royalties under Section 115. *See* 37 C.F.R. 385.11 ("Interactive stream means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114(d)(2)."); *see also* Settlement Agreement, *Phonorecords II* (Apr. 11, 2012) (incorporating the definitions set forth in Section 114 in order to identify services required to pay Section 115 royalties).

This distinction is of particular significance today, due to the emergence of significant new digital services that blur the line between interactive and non-interactive. Given the unprecedented levels of music use by these new services, and the adverse impact they are having on the sale of phonorecords, it is critically important to music publishers that the use of their works by these services is fairly and appropriately compensated. In order to ensure that they receive fair compensation for the use of their music by these services, the NMPA has a significant interest in participating in any and all discussions in this proceeding regarding the proper classification of these services.

SoundExchange argues that the issue of whether certain services are interactive or non-interactive "is not going to be determined in this proceeding." (Mot. at 8.) That conclusion is wrong, or at the very least, premature. None of the authority cited by SoundExchange stands for the proposition that this proceeding cannot determine or

affect whether certain services are considered to be interactive or non-interactive.[4] Indeed, there are numerous examples from recent CRB proceedings—proceedings commenced, ostensibly, for the sole purpose of setting statutory rates and terms—where parties have raised the precise sort of definitional and eligibility issues that SoundExchange now claims are outside the scope of this proceeding.

For example, *Phonorecords II* was resolved through a voluntary settlement after a period of extensive negotiations. The regulations proposed to the CRB by the settling parties defined and categorized a range of new digital music services, including, but not limited to, limited offerings (which provide interactive streams of pre-programmed content or on-demand access to a substantially limited catalog of music), content lockers (which provide streaming access to sound recordings previously purchased by the listener) and mixed services (which provide music offerings and non-music offerings like Internet access or mobile phone service as part of one transaction with one fee). *See* Proposed Rule, *Phonorecords II*, 77 FR 29259-01 (May 17, 2012). Similarly, in the last Section 114 rate-setting proceeding, Intercollegiate Broadcasting System, Inc. ("IBS") requested that the CRB "distinguish between two different types of noncommercial webcasters—small and very small—within the broader category," and set

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[4] SoundExchange correctly notes that the Copyright Office denied a petition submitted by DiMA in April 2000 and that DiMA had, at that time, requested that the Copyright Office take action with respect to certain definitions set forth in Section 114. *See* Public Performance of Sound Recordings: Definition of a Service, Dkt. No. RM 2000-4B, 65 Fed. Reg. 77330-01 (Dec. 11, 2000). Yet SoundExchange glosses over the fact that DiMA had petitioned for a new, standalone rulemaking proceeding meant only to address such definitions and that the Copyright Office's denial of the petition was based on a finding that DiMA had failed to present "a persuasive case that a rulemaking on this issue [was] necessary, desirable or feasible." *Id.* at 77333. SoundExchange also fails to note that this decision has not prevented parties from raising similar issues in subsequent proceedings.

rates accordingly. *See* Final Rule and Order, Digital Performance Right in Sound Recordings and Ephemeral Recordings, Dkt. No. 2009-1 CRB, 76 FR 13026-01, 13041-42 (Mar. 9, 2011) ("*Webcasting III*"). Although the CRB denied IBS's request for failure to present sufficient evidence, it gave no indication that the question of how to categorize those services was outside the scope of the proceeding.

The emergence of new services that blur the line between interactive and non-interactive makes this proceeding particularly likely to result in a settlement or ruling from the CRB that determines or affects whether those services are considered to be interactive or non-interactive. If and when those issues arise in this proceeding, the NMPA has a significant interest in being heard. There is no legitimate basis for SoundExchange to prevent this.

III.
THE NMPA HAS A SIGNIFICANT INTEREST IN THIS PROCEEDING BECAUSE IT WILL IMPACT THE PERFORMANCE ROYALTIES PAID TO MUSIC PUBLISHERS IN FUTURE RATE NEGOTIATIONS

The NMPA also has a significant interest in this proceeding because the sound recording performance royalty rates for digital music services set here are bound to have a financial impact when the same services negotiate musical work performance royalty rates with music publishers in the future.

The financial connection between sound recording performance royalty rates and musical work performance royalties is illustrated by the recent direct license negotiations between certain music publishers and Pandora, as well as the direct license negotiations between music publishers and Apple for the use of their songs on the recently launched iTunes Radio service. Those direct licenses were the subject of the recently concluded rate court proceeding involving ASCAP and Pandora, where they

were put forth as market benchmark agreements for the purposes of determining the appropriate rates payable by Pandora to ASCAP. *See* Opinion & Order, *United States* v. *Am. Soc'y of Composers, Authors & Publishers (In re Petition of Pandora Media, Inc.)*, No. 12-8035 (S.D.N.Y. Mar. 14, 2014). The record in that proceeding demonstrates that music services such as Pandora and iTunes Radio view sound recording and musical work public performance royalties as "one pie" of content acquisition costs, and negotiate with music publishers accordingly.

As a result of the "one pie" approach endorsed by digital music services and advanced in their negotiations with copyright owners, the royalty rates determined in this proceeding will directly impact the royalties available to be paid by those services to music publishers for the performance of their musical works. The more that streaming services like Pandora and iTunes Radio have to pay SoundExchange as a result of this proceeding, the less they will be willing to pay music publishers; the less they have to pay SoundExchange as a result of this proceeding, the more they will be able to pay music publishers.

SoundExchange argues that this financial interest "is merely an indirect financial stake," and is no different from the interest of "*anyone* who does or might charge fees to digital services." (Mot. at 7 (emphasis in original).) That is not correct. Services such as Pandora and iTunes Radio are built entirely on the performance of music. As such, the royalties they pay to SoundExchange and music publishers constitute their primary operating expense. And the "one pie" approach taken by those services in their license negotiations with music publishers shows that those services view those two royalty payments as *directly* linked. There is no such direct link between

sound recording royalty payments and any other operating expenses of those services, such as salaries and hosting costs. Accordingly, there is no basis for SoundExchange's concern that permitting the NMPA to participate in this proceeding will somehow "open the floodgates" to other entities seeking to participate.[5]

IV.
SECTION 114(i) DOES NOT PRECLUDE THE NMPA'S PARTICIPATION IN THIS PROCEEDING

SoundExchange also argues that the NMPA does not have a significant interest in this proceeding because Section 114(i) of the Copyright Act ensures that this proceeding will not impact the rates set for musical work royalties. (Mot. at 9-10.) But Section 114(i) simply prevents the introduction of information concerning the fees paid for the public performance of sound recordings in *judicial* proceedings to set fees for the public performance of musical works, such as ASCAP or BMI rate court proceedings. That section does not prevent music users from taking sound recording royalty rates into account when negotiating license agreements with music publishers or PROs such as ASCAP, BMI and SESAC. Indeed, that section has no relevance whatsoever to the negotiation of rates by SESAC or to the direct license negotiations by music publishers,

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[5] SoundExchange presents a secondary challenge to the NMPA's interest in protecting musical work royalties in a footnote, asserting that arguments on this issue have already been rejected by the CRB as inappropriate for Section 114 proceedings and citing the CRB's decision upon the remand of *Webcasting III*. (Mot. at 7, n.2.) The *Webcasting III Remand* decision, however, provides no support for SoundExchange's current argument and has no relevance to the issue now before the CRB. Although the CRB discussed the relationship between sound recording royalties and other operating costs, it did so only in the context of criticizing the economic model put forth by an expert witness. *See* Determination After Remand of Rates and Terms for Royalty Years 2011-2015, at 17-24, *Webcasting III* (Jan. 9, 2014). The CRB found that the proposed economic theory was an inappropriate paradigm for the proceeding, but did not categorically reject the consideration of complementary royalty streams in Section 114 proceedings.

neither of which are subject to judicial oversight. This distinction is significant, since the vast majority of public performance license agreements are entered into voluntarily, without judicial oversight, and thus are not subject to the limitations in Section 114(i).

In addition, there is currently legislation pending before Congress that would eliminate Section 114(i)'s prohibition on the use of information concerning sound recording public performance fees in proceedings to set musical work performance fees. *See* H. R. 4079 (Feb. 25, 2014). If passed, this legislation would almost certainly take effect prior to the expiration of the rates to be set in this proceeding.

In sum, the limitations set by Section 114(i) in no way preclude the NMPA from participating in this proceeding.

V.
THE NMPA'S PARTICIPATION WILL NOT THREATEN THE EFFICIENCY OR JUST ADMINISTRATION OF THIS PROCEEDING

Equally baseless is SoundExchange's concern that the NMPA's participation will somehow "threaten" the efficiency or just administration of this proceeding. (Mot. at 10.) As a participant in previous Section 115 proceedings, the NMPA understands the complexities of litigation before the CRB and the associated need for efficiency. Accordingly, the NMPA intends to limit its participation in this proceeding only to those issues described herein, and only when those issues arise. SoundExchange has failed to identify a single example of how the NMPA's very limited involvement in this proceeding will somehow cause it (or any other participant) to expend additional time or resources.

In sum, there is simply no basis for SoundExchange's professed concern that the NMPA's involvement will cause these proceedings to be any more lengthy, complex or expensive than they already would be without the NMPA's participation.

CONCLUSION

For the foregoing reasons, SoundExchange's Motion to Deny the NMPA's Petition to Participate should be denied.

Dated: April 2, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2014, I caused a true and correct copy of the foregoing opposition to be served via email and first class mail on the following parties:

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